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**IN THE  
COURT OF APPEALS OF INDIANA**

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JAMES R. RECKER, II,  
Appellant-Plaintiff,

vs.

ALLEY CAT LOUNGE, INC.,  
Appellee-Defendant.

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No. 49A05-0704-CV-189

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Gerald Zore, Judge  
Cause No. 49D07-0404-CT-781

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**December 4, 2007**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**BRADFORD, Judge**

Appellant-Plaintiff James R. Recker, II appeals from the trial court's order granting Appellee-Defendant The Alley Cat Lounge, Inc.'s ("the Alley Cat") motion to set aside a default judgment which had previously been entered against it. Upon appeal, Recker claims that the trial court abused its discretion by granting the Alley Cat's motion to set aside the default judgment. Recker additionally claims that the trial court abused its discretion by denying his motion to tender additional evidence. We affirm.

### **FACTS AND PROCEDURAL HISTORY**

On May 3, 2002, Recker was a patron at the Alley Cat where he suffered personal injuries as a result of an alleged altercation involving another patron. On March 1, 2004, Recker informed the Alley Cat, by letter, that he intended to file suit against the establishment within thirty days.<sup>1</sup> On April 20, 2004, Recker filed suit against the Alley Cat alleging negligence, negligence per se, a Dram Shop violation, and punitive damages. Recker twice attempted, unsuccessfully, to serve his complaint upon the Alley Cat's registered agent at the address provided to the Indiana Secretary of State corporate database by sheriff's return.<sup>2</sup> The Alley Cat did not file a responsive pleading, and on September 20, 2004, the trial court entered a default judgment against the Alley Cat, in the principal sum of \$55,154.75.

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<sup>1</sup> This letter was sent directly to the Alley Cat, located on Carrollton Avenue in Indianapolis, not to the Alley Cat's registered agent.

<sup>2</sup> The address provided to the Indiana Secretary of State showed the Alley Cat's registered agent's address to be 1052 Timberland Drive, Indianapolis, Indiana, 46220. However, the proffered evidence shows the Alley Cat's registered agent moved from that address in March of 2004 and subsequently failed to notify the Indiana Secretary of State of her change of address. As a result, the Alley Cat claims that no officer, owner, or employee was ever served with Recker's Complaint and Summons, and therefore, the Alley Cat could not answer such claims.

On January 12, 2007, counsel for the Alley Cat filed his appearance and subsequently filed a motion asking the trial court to set aside the September 20, 2004, default judgment. The trial court held a hearing on the Alley Cat's motion on February 20, 2007, on which date Recker filed his response to said motion. The trial court granted the Alley Cat ten days to file a reply to Recker's February 20, 2007, brief, which it filed on March 2, 2007. Also on March 2, 2007, Recker filed a motion requesting permission to tender additional evidence to the trial court.<sup>3</sup>

On March 8, 2007, the trial court issued two separate orders. The first order set aside the default judgment that was previously entered against the Alley Cat, and the second order denied Recker's request to tender additional evidence to the trial court. This appeal follows.

## **DISCUSSION AND DECISION**

### **I. Determination to Set Aside Default Judgment**

Recker claims that the trial court abused its discretion by granting the Alley Cat's motion to set aside the default judgment. We disagree. Indiana Trial Rule 55(A) authorizes the entry of default judgments for failure to file responsive pleadings. *Anderson v. State Auto Ins. Co.*, 851 N.E.2d 368, 370 (Ind. Ct. App. 2006). Once entered, a default judgment may be set aside because of mistake, surprise, or excusable neglect. Ind. Trial Rule 60(B)(1). When deciding whether a default judgment may be set aside because of excusable neglect, the trial court must consider the unique factual

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<sup>3</sup> Recker filed this motion in direct contradiction to the trial court's previous determination that it did not need any additional evidence from Recker.

background of each case because “no fixed rules or standards have been established as the circumstances of no two cases are alike.” *Coslett v. Weddle Bros. Constr. Co., Inc.*, 798 N.E.2d 859, 860-61 (Ind. 2003) (quoting *Siebert Oxidermo, Inc. v. Shields*, 446 N.E.2d 332, 340 (Ind. 1983)). Generally, default judgments are not favored in Indiana, for it has long been the preferred policy of this State that courts decide a controversy on its merits. *Walker v. Kelley*, 819 N.E.2d 836, 837 (Ind. Ct. App. 2004). Any doubt of the propriety of a default judgment should be resolved in favor of the defaulted party. *Id.*

On appeal, we pay substantial deference to the trial court’s decision regarding whether to set aside a default judgment. *See Anderson*, 851 N.E.2d at 370 (citing *Kmart Corp. v. Englebright*, 719 N.E.2d 1249, 1253 (Ind. Ct. App. 1999)). Our standard of review is limited to determining whether the trial court abused its discretion. *Id.* An abuse of discretion may occur if the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law. *Id.* We will not reweigh the evidence or substitute our judgment for the judgment of the trial court. *Id.* Furthermore, a trial court will not be found to have abused its discretion “so long as there exists even slight evidence of excusable neglect.” *Coslett*, 798 N.E.2d at 861 (quoting *Security Bank & Trust Co. v. Citizens Nat’l Bank*, 533 N.E.2d 1245, 1247 (Ind. Ct. App. 1989)).

Recker claims that the trial court abused its discretion by setting aside the default judgment against the Alley Cat because his various attempts to provide service to the Alley Cat were sufficient to satisfy the service requirements as outlined under Indiana Trial Rules 4.6(B) and 4.1(A)(3) and Indiana Code section 23-1-24-4 (2004). In support

of his claim, Recker highlights this court's conclusion in *Precise Erecting, Inc. v. Todd Wokurka*, 638 N.E.2d 472, 474 (Ind. Ct. App. 1994) that the plaintiff's service upon the defendant was sufficient under the trial rules. We find this case unpersuasive, however, because the facts in *Precise Erecting* are distinguishable. In *Precision Erecting*, the plaintiff sent a copy of the summons and the complaint to the registered agent's home address. *Precise Erecting*, 638 N.E.2d at 473. The registered agent's wife signed the return receipt for the summons and the complaint. *Id.* The registered agent then failed to forward the summons and the complaint on to the defendant corporation. *Id.* Here, in contrast, Recker sent a summons to an outdated address, so the registered agent arguably never even received notice of the complaint.<sup>4</sup>

Recognizing Indiana's strong preference to decide cases on their merits, we grant substantial deference to the trial court's decision to set aside the default judgment and hear this matter on the merits. *See generally, Anderson*, 851 N.E.2d at 370; *Walker*, 819 N.E.2d at 837. We believe that the trial court was in the best position to weigh the proffered evidence and to judge the credibility of the witnesses, and as such, conclude that the trial court did not abuse its discretion by setting aside the default judgment. The trial court did not specify its reason for setting aside the default judgment, but the record

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<sup>4</sup> After consulting a map of the area in which both Recker's legal counsel's office and the Alley Cat are located, it appears that the Alley Cat is located roughly 2000 feet, as the crow flies, or 0.6 miles, driving distance, from Recker's legal counsel's office. The close proximity leads us to question why Recker was unable to serve a copy of the summons and the complaint upon the Alley Cat itself after service upon the Alley Cat's registered agent failed. Recker previously delivered a letter informing the Alley Cat that he was considering whether to file suit and there was no evidence presented to suggest that Recker could not have once again delivered documents directly to the Alley Cat itself. Any such service would have been sufficient to give the Alley Cat actual notice of the pending lawsuit.

indicates that its decision was justified on several bases, including the argument that the Alley Cat's registered agent and the Alley Cat itself never received a proper summons alerting them of the complaint. We therefore conclude that the trial court did not abuse its discretion by setting aside the default judgment.

## **II. Admissibility of Evidence**

Recker further asserts that the trial court abused its discretion by denying his request to present additional evidence pertaining to whether the default judgment should be set aside. We disagree.

Ruling on the admissibility of evidence is a matter left to the sound discretion of the trial court. *Town of Highland v. Zerkel*, 659 N.E.2d 1113, 1117 (Ind. Ct. App. 1995). We will not disturb the decision of the trial court absent an abuse of that discretion. *Id.* An abuse of discretion exists only when the trial court's action is clearly erroneous and against the facts and circumstances before the trial court or reasonable inferences to be drawn therefrom. *Rust v. Guinn*, 429 N.E.2d 299, 305 (Ind. Ct. App. 1981).

Recker first attempted to introduce additional evidence pertaining to whether the default judgment should be set aside at the February 20, 2007. At that time, the trial court informed Recker that additional evidence was not required. On March 2, 2007, Recker again, this time by motion, attempted to introduce additional evidence before the trial court. The trial court issued an order denying Recker's request on March 8, 2007. As this evidence was expressly limited to the question of whether to set aside a default judgment, and given this State's preference to decide cases on their merits and our substantial deference to the trial court's determination to set aside a default judgment, we

cannot conclude that the trial court abused its discretion by denying Recker's request to present such additional evidence. Since we have concluded that the trial court did not abuse its discretion by setting aside the default judgment or in denying Recker's request to introduce additional evidence before the court, we hereby affirm the judgment of the trial court.

The judgment of the trial court is affirmed.

BAKER, C.J., and DARDEN, J., concur.